KWAN YOON FATT & SONS SDN. BHD. & ORS.

v.

TRENDS BUILDINGS SDN. BHD.

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[ORIGINATING MOTION NO. 25-49-92]
8 MARCH 1993

LAND LAW: Private caveat - Conflicting affidavit evidence - Plausibility - Onus - Serious questions - Delay in filing writ for specific performance.

The first defendant is the registered proprietor of the lands. The second applicant is a company who have entered into sale and purchase agreement with the first applicant in respect of the lands. The respondent and the first applicant entered into a development agreement to develop the lands. The respondent alleges that the sale of the lands by the first applicant to the second applicant was a breach of the development agreement as well as a breach of the trust. The respondent claims that they are entitled to specific performance.

Held:

[1] Although there are several conflicts of evidence in the affidavits of both parties, the evidence on affidavits of the respondent when judged together with the applicant's affidavit does not have sufficient *prima facie* plausibility. The relevant statements in the respondent's affidavit are either equivocal, lacking in precision, in conflict with contemporary documentary evidence or inherently improbable. In other words, the Court was not satisfied that the conflicts leave serious questions to be tried.

[2] Based on the analysis and findings, the respondent (caveator) has failed to discharge the onus of satisfying the Court that on the evidence on affidavits as presented before the Court, pertaining to their claim to an interest in the lands, there is a serious question to be tried.

[3] The caveator must show that having entered the caveat, he had taken prompt action to commence proceedings for specific performance. In the present case there is no evidence of prompt action. The caveat was entered on 30 June 1992, the writ claiming specific performance is only filed today, 8 March 1993. In other words there has been a delay of eight months. Having delayed for eight months the respondent cannot now be allowed to say to this Court that the balance of convenience should be in their favour. The presence of a caveat on the land registered is a blot on the land affected and tends to hamper the registered proprietor in dealing with his land; therefore unless a caveator proceeds with reasonable diligence he ought not be allowed to continue to interfere with the rights of the registered proprietor.

[Application allowed].

Case referred to:
Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 212 ***(foll)***

Legislation referred to:
National Land Code, ss. 327, 329

For the applicant - L. Sabapathy
For the respondent - Ragbir Singh

JUDGMENT

Mohd Hishamudin bin Mohd Yunus JC: This is an application under ss. 327 & 329 of the National Land Code by the applicants for -

(a) an order (under s. 327) for the removal of a caveat entered by the respondent in respect of the following five pieces of land (hereinafter referred to as the "lands") in the Mukim of Ampang:

1. EMR 2266 Lot 840
2. EMR 2267 Lot 841
3. EMR 2268 Lot 842
4. EMR 2269 Lot 843
5. EMR 2270 Lot 849; and

(b) an order (under s. 329) for compensation to be paid to the applicants for any damage or loss suffered arising from such wrongful caveat, to be assessed by the Senior Assistant Registrar.

The first applicant, Kwan Yoon Fatt & Sons Sdn. Bhd., is the registered proprietor of the lands. The second applicant, Pacline (M) Sdn. Bhd., is a company who have entered into sale and purchase agreements with the first applicant in respect of the lands. The respondent is a company with which the first applicants have entered into a development agreement on 12 July 1988 (and two other supplemental agreements on 14 September 1990 and 8 November

1990) to develop the lands. The caveat in question was entered by the respondent on 30 June 1992.

I shall first deal with the first applicant's application. The first applicant is the caveatee. The respondent does not dispute the fact that the first applicant is the registered owner of the lands. In *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212, Lord Diplock, delivering the judgment of the Judicial Committee of the Privy Council, said (at p. 215):

> In their Lordship's view a distinction must be drawn between cases where the applicant is the registered proprietor of the land (that is, the caveatee) and cases where the applicant is some other person who claims to an interest in it. In the former case the caveatee can rely upon his registered title as *prima facie* evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the Court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so.

In the present case, since the first applicant has in their "First Affidavit" - hereinafter referred to as the "First Affidavit" (see encl. 2) adduced clear evidence that they are the registered proprietor of the lands, and this fact is admitted by the respondent in their first affidavit (see encl. 6), the first applicant has, therefore, raised a *prima facie* evidence of their unfettered right to deal with the lands as they please. The onus, therefore, now shifts to the respondent - the caveator.

As to the nature of the onus, the Privy Council, in the same judgment, ruled as follows (at same page):

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under s. 327 for removal of a caveat: he must first satisfy the Court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

In order to satisfy the first requirement, the respondent filed two affidavits: the first is affirmed by one Eng Yong Seng, a director of the respondent company, on 20 January 1993 (encl. 6) and the second is affirmed by the same Eng Yong Seng on 2 March 1993 (encl. 12). In their affidavits the respondent asserts that by virtue of clause 35 of the development agreement the respondent acquired a beneficial interest in the lands with the first applicant, by virtue of being the registered owner, as the trustee, and the respondent as the beneficiary. Clause 35 reads:

> 35. So long as the said Land continues to be registered in the name of the Land owner, the Land Owner will hold the said Land as Trustee for the Developer on the terms and conditions as contained in this agreement.

In other words, according to the respondent, clause 35 created a trust in favour of the respondent. The respondent alleges that the sale of the lands by the first applicant to the second applicant was a breach of the development agreement as well as a breach of the trust. The respondent claims that they are entitled to specific performance.

The first applicant, on the other hand, states in their affidavits that the respondent had breached clauses 9 and 10 of the development agreement as well as clause 3 of the first supplemental agreement. Clauses 9 and 10 read as follows:

> 9. If the Developer shall fall to obtain the requisite approval from the relevant authorities to develop the said Land within a period of One and a half ($1\ ^1/_2$) years from the date hereof due to whatever reasons beyond the control of the Developer, the developer shall upon the request of the Land owner forthwith return the relevant issue Document of Titles to the said Land free from all encumberances to the Land Owner and thereafter this agreement shall become null and void and neither party shall have any claim whatsoever against the other in respect of this agreement.
>
> 10 If through no fault of the Land Owner, the Developer shall fall to commence civil works for construction of the said Housing Units and/or flats within a period of Six (6) months after obtaining the requisite approval from the relevant authorities for the said Housing Project or within such further extension of time as may be allowed by the Land Owner, the Developer shall upon the request of the Land Owner forthwith return the relevant issue Document of Titles to the said Land free from all encumbrances to the Land Owner whereupon this agreement shall become null and void and of no further effect or force and neither party shall have any claim

whatsoever against the other in respect of this agreement.

Clause 3 of the first supplemental agreement reads:

> 3. The Developer shall within One Hundred and Twenty (120) days from the date hereof procure and deliver to the Landowner a performance bond in the sum of Malaysian Ringgit One Million Only (RM1,000,000) issued by a reputable financial institution or Insurance Company in favour of the Landowner, *inter alia*, guaranteeing the Developer's performance of the various covenants undertaken in the Principal Agreement and in this agreement and undertaking to pay to the Landowner on a simple demand, the sum of Malaysian Ringgit One Million Only (RM1,000,000) in the event of the Developer breaching any or some of the terms and conditions contained in the principal agreement and in this agreement.

The first applicant, in their affidavits, further state that they had extended the time for the respondent to provide the performance bond until 15 May 1991 but, despite the extension granted, the respondent still failed to provide the same.

In their affidavits the first applicant contends that by reason of the failure on the part of the respondent to provide the performance bond, the first applicant, through their solicitors, had requested the return of the original issue documents of title in respect of the lands and that this was complied with by the respondent. Thereafter, the first applicant's solicitors issued to the respondent a notice of the termination of the development agreement. The notice stated that the reason for the termination was the failure of the respondent to comply with clauses 9 and 10 of the development agreement and with clause 3 of the first supplemental agreement. The notice also informed the respondent that the power of attorney granted by the first applicant to the respondent was automatically revoked (see exh.. K6 of the first applicant's "First Affidavit" - encl. 2).

At the outset I wish to state that it is my observation from the first applicant's affidavits and the submission of learned Counsel for the first applicant before me that the thrust of the first applicant's case is more on the alleged breach of clause 3 of the supplemental agreement (failure to provide the performance bond) rather than on the alleged breach of clauses 9 and 10 of the development agreement.

The respondent admits that they had breached clause 3 of the first supplemental agreement. However, they state in their affidavits that the first applicant is estopped from terminating the development agreement because, despite the breach, the first applicant had carried on with the development agreement. The respondent in their affidavits deny that the issue documents of title were returned to the first applicant because of the failure to provide the performance bond: they aver that the issue documents of title were returned to the first applicant merely for safekeeping. The respondent further states in their affidavits that the purported termination of the development agreement by the first applicant was not *bona fide* in that it was not motivated by the breach but by the desire to sell the lands to the second applicant.

In *Eng Mee Yong*, the Privy Council (at p. 216) held that:

> Their Lordships must therefore turn to the evidence before the High Court on the hearing of the application, bearing in mind that *if there appears to be any conflict of evidence which is not on the face of it implausible, such a conflict ought not to be disposed of on affidavit evidence only. It leaves a serious question to be tried.*
> (Italics mine).

At p. 217 their Lordships dwelt further on the principle governing the assessment of evidence on affidavit in a case of this nature:

> Although in the normal way it is not appropriate for a Judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponents, or inherently improbable in itself it may be. In making such order on the application as he may think just the Judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth.

I have scrutinised critically the affidavits of both parties. Although there are several conflicts of evidence, I am not satisfied that the evidence on affidavits of the respondent, when

judged together with the applicant's affidavits, have sufficient *prima facie* plausibility. It is my findings that the relevant statements in the respondent's affidavits are either equivocal, lacking in precision, in conflict with contemporary documentary evidence or inherently improbable. In other words, I am not satisfied that the conflicts leave serious questions to be tried.

In paragraph 6 of the respondent's first affidavit (encl. 6), the respondent sets out the particulars showing the steps taken by the first applicant to carry on with the development agreement despite the breach. In that paragraph it is avered as follows:

> 6. On the other hand, the first plaintiff has taken steps to carry on with the Development Agreement. Particulars of the steps taken by the first plaintiff are as follows:
>
> (a) On 8 August 1988 the first plaintiff executed a power of attorney (hereinafter referred to as "the Power of Attorney"). The Power of Attorney was registered on 10 August 1988. A copy of the said Power of Attorney is now produced and shown to be marked as exhibit "EYS-1". The Power of Attorney is still valid and was not revoked till 2 June 1992 whereupon the first plaintiff gave the purported notice of termination.
>
> (b) The first plaintiff was a party to the sale and purchase agreements of parcel units on the said Lands (hereinafter referred to as "the said Sale and Purchase Agreements").

Particulars

Purchaser	Lot No.	Date of Agreement
Tan Soo Leng	2B6	15 July 1991
Tan Wee Neng	3B3	2 August 1991
Lee Kim Teng	2A4	4 November 1991
Chew Po San	2A7	17 November 1991

Below is a list of purchasers who have paid the deposit but have opted to sign the agreement at a later date:

Purchaser	Lot No.	Date of Payment
Tan Wee Meng	2A5, 2A6, 2B5 and 2B7	10 June 1991
Teo Giok Kiaw	3A2	4 January 1991
An Aik Kin	2A2	11 January 1991

A copy of the Sale and Purchase Agreement is now produced and shown to me marked as exhibit "EYS-2". I wish to state that all the Sale and Purchase Agreements have the same terms save for the dates, names and lot numbers.

> (c) On 17 January 1992 the first plaintiff passed a resolution allowing the said Lands to be charged in favour of MBf Finance Bhd. as security for a loan which is to be given to the defendant to develop the housing project under the Development Agreement. A copy of the said resolution is now produced and shown to me marked as exhibit "EYS-3".
>
> (d) The first plaintiff executed the charge documents stated above. However, the said charge has yet to be registered. A copy of a letter by Messrs. Goh and Partners dated 1 April 1992 is now produced and shown to me marked as exhibit "EYS-4".

Further, in paragraph 7 of their first affidavit, the respondent company states:

> 7. From the above facts I have been advised by the defendant's solicitors and I verily believe that the first plaintiff has waived the term concerning the performance bond and has accepted the defendant's failure to fulfil the said term and has affirmed the Development Agreement. Therefore the first plaintiff is estopped from terminating the Development Agreement and therefore the notice of termination (exhibit "K-6" of the first affidavit) is wrongful and should not have been given by the first plaintiff.

It is encumbent upon me to examine paragraph 6. First, I find that paragraph 6(a) is equivocal. It is not clear as to what is actually relied upon by the respondent to show the steps allegedly taken by the respondent to carry on with the development agreement despite the breach. Is the respondent relying on the execution and registration of the power of attorney done in 1988? If what is meant by "steps taken" was the execution and registration of the power of attorney, then paragraph 6(a) really does not make sense. For the execution and registration of the power of attorney took place way back in 1988 when the question of breach had not yet been raised. If, however, the respondent is relying on the failure of the first applicant to take prompt action to revoke the power of attorney as giving rise to estoppel, then it is my view that I fail to see how the mere failure to take prompt action to revoke the power of attorney can by itself be regarded as evidence of an indication on the part of the applicant to carry on with the

development agreement despite the breach. It must be pointed out that the power of attorney is tied up with the development agreement. In the power of attorney there is a reference to the development agreement. The arrangement that had been entered into between the parties was such that there was no necessity for the first applicant to revoke the power of attorney in the event the joint venture turned sour because it is expressly provided in the power of attorney that in the event the development agreement is terminated, the power of attorney is automatically revoked. And it is common ground that this automatic revocation was brought to the notice of the respondent by the first applicant in its notice of termination of the development agreement dated 2 June 1992 (see exh. K6 of encl. 2). This was followed by the registration of a formal deed of revocation of the power of attorney dated 22 October 1992 on 9 November 1992 (see exh. K15 of encl. 7).

As to paragraph 6(b), the first applicant, in their "Third Affidavit" (encl. 7), denies being a party to such sale and purchase agreements and alleges that it was the respondent who purported to enter into such agreements as attorney of the first applicant whereas in the first place the power of attorney did not authorise the respondent to enter into such agreements on the first applicant's behalf. I have examined the sale and purchase agreements and I find that each of the agreements was not signed by any of the officers or agents of the first applicant but was signed by one Eng Yong Seng, a director of the respondent company, purportedly as the attorney of the first applicant by virtue of the power of attorney. I have also examined the power of attorney but I find nothing in this document authorising the respondent to enter into such agreements on behalf of the first applicant. Learned Counsel for the respondent argues that the respondent did have such an authorisation by virtue of Clause 5 of the power of attorney which reads:

> 5. For the purpose aforesaid to do every other act matter or thing which may by our Attorney be deemed to be necessary or proper in relation to the said Land.

I cannot accept such a contention in view of the governing words "For the purpose aforesaid" in the clause. In my interpretation, such words limit the power conferred by clause 5 merely to the carrying out of acts incidental to the powers conferred by the preceding clauses 1, 2, 3, and 4 of the power of attorney for the purposes mentioned in those clauses. Clause 1 authorises the attorney to raise and borrow funds from banks or financial institutions upon the security of the lands for the purposes of the project. Clause 2 authorises the attorney to deal with the relevant authorities with regard to conversion, subdivision and the issue of titles in connection with the project. Clause 3 authorises the attorney to submit building plans to the relevant authorities and to obtain from such authorities the approval to construct housing units on the lands. Clause 4 authorises the attorney to apply for the certificates of fitness from the relevant authorities in respect of the housing units. Therefore, I am unable to find anything in clause 5 authorising the respondent to enter into sale and purchase agreements with third parties as an attorney of the first applicant.

As to paragraphs 6(c) and 6(d), I find paragraph 3(f) of the first applicant's "Third Affidavit" (see encl. 7) as providing a satisfactory answer. In paragraph 3(f), the first applicant states:

> (f) With regards paragraph 6(c) and (d) of the defendant's affidavit, I state that the first plaintiff agreed to charge the said lands to the financier but when the defendant failed to provide the performance as agreed, the first plaintiff asked for the return of the titles to the said lands. The financing transaction was consequently aborted and was never drawndown.

In my opinion, the affidavits as a whole, far from showing positive indications that both parties were determined and had taken steps to carry on with the project despite the breach, on the contrary, show that both sides were aware of the hopelessness of the situation. To begin with, paragraph 8 of the first applicant's "First Affidavit" (encl. 2) states:

> 8. When the defendant failed to provide the performance bond after the expiry of the said date, the first plaintiff demanded the return of the issue documents of title of the said lands from the defendant. There is now produced and shown to me a copy of the letter dated 6 May 1992 from the defendant marked "K-5".

The letter, exhibit K5, is in fact a letter from the respondent (with a copy extended to the first applicant) to the solicitors having custody of the titles to the lands to arrange for the collection of

the titles by the respondent with the intention of returning them to the first applicant. The letter reads:

> Ref: Land Title No. EMRs 2266, 2267, 2269 and 2270
>
> Mukim Ampang, Daerah Hulu Langat, Selangor
>
> We refer to our letter dated 28 January 1992, (Ref: WM/G&P/01) and kindly be informed that Messrs. Kwan Yoon Fatt & Sons Sdn. Bhd. has requested us to return the original copy of the land title of the abovementioned lots.
>
> We shall be much obliged if you could arrange for us to collect the documents to be handed back to the landowner, and we undertake to reimburse you for your fees and expenses.

Subsequently, by a letter dated 2 June 1992 the solicitors for the first applicant notified the respondent of the termination in the following terms:

> Re: Development Agreement dated 12 July 1988 and supplementary Agreement dated 14 September 1990.
>
> We are to refer to the above matter wherein we act for Kwan Yoon Fatt & Sons Sdn. Bhd.
>
> We have been instructed to formally inform you, which we hereby do, that the above agreements have been terminated pursuant to, *inter alia*, clause (9) and (10) of the said Development Agreement and failure on your part to deliver to our client the requisite performance bond of RM1,000,000 within 120 days of 14 September 1990 as stipulated in the said Supplementary Agreement. Accordingly, the power of attorney dated 8 August 1988, is also automatically revoked.

By a letter dated 17 June 1992 the respondent replied to the first applicant's solicitors as follows (see exh. K7 of the first applicant's First Affidavit - encl. 2):

> Subject: (a) Development Agreement Dated 12 July 1988
> (b) Power Of Attorney Dated 8 August 1988
> (c) First Supplemental Agreement Dated 14 September 1990
> (d) Second Supplemental Agreement Dated 8 November 1990
>
> We refer to your letter dated 2 June 1992 ref: CSK/KYFS/C-661/90 and the contents therein.
>
> We have tried very hard. However, we are afraid to inform you that we are still unable to understand your letter. Nevertheless, like an emergency you may well be entitled, at any stage, to formally terminate on behalf of your client the abovementioned agreements between Messrs. Kwan Yoon Fatt & Sons Sdn. Bhd. and Trends Building Sdn. Bhd. but we are not too sure whether the sales and purchase agreements entered into with the end-users wherein your client is also one of the parties to those contracts could be done just like that without repercussion. We do not know but you have worried us enormously.
>
> Kindly study carefully all the agreements again and revert to us whether your advice and professional obligations to your client have been exercised properly.

In my view, this letter is a clear acknowledgment by the respondent of the right of the first applicant to terminate the development agreement, the power of attorney and the supplemental agreements. It is to be noted that in this letter the respondent cautioned the first applicant's solicitors of the implication of the revocation on the sale and purchase agreements with the third parties. But as I have pointed out, it was the respondent who had purportedly made the first applicant a party to the sale and purchase agreements whereas in the first place they had no authority to do so. If it is true that the first applicant had by their acts induced the respondent into believing that the development agreement was still subsisting despite the breach, surely the respondent, in the above letter, would have strongly protested against the termination; and certainly the respondent, in the first place, would not have returned the titles to the respondent. The fact that the respondent did not protest (they only pleaded for reconsideration) but instead accepted the first applicant's right to terminate, coupled with the respondent's willingness to return the titles, clearly show that the parties had already realised that the relationship could not continue anymore. The respondent's assertion that the titles were returned to the first applicant merely for safekeeping is rather weak and unconvincing. Exhibit K5 of encl. 2 is the respondent's own letter, yet there is nothing in K5 indicating that the titles were returned for the purpose of safekeeping. On the other hand it is clear from

K5 that the respondent returned the titles to the first applicant because the first applicant had asked them to do so.

Turning now to clauses 9 and 10 of the development agreement, as has been pointed out earlier, the first applicant also alleges in paragraph 9 of their "First Affidavit" that the respondent had breached these clauses. This allegation is not expressly admitted by the respondent but at the same time it is also not denied by the respondent For, in paragraph 10 of the respondent's first affidavit, it is merely stated as follows:

> 10. Referring to paragraph 9 of the First Affidavit, I wish to state that the notice of termination is incorrect in law and equity based on the grounds stated above.

Be that as it may, in my opinion, in the light of exh. K7 of the first applicant's "First Affidavit", this paragraph must be taken as an implied admission on the part of the respondent as to the breaches and that this paragraph contains merely the defence of estoppel based on facts that I had already scrutinised and discussed above, and nothing more. In this connection it is important to note that clauses 9 and 10 of the development agreement stipulates that, if there be a failure to comply with any of these clauses and thereafter if, upon demand, the respondent were to return the issue documents of title to the first applicant, the agreement automatically becomes null and void.

Based on the above analysis and findings, it is my conclusion that the respondent (the caveator) has failed to discharge the onus of satisfying the Court that on the evidence on affidavits as presented before the Court, pertaining to their claim to an interest in the lands, there is a serious question to be tried.

Assuming that I am wrong as regards the first requirement as laid down in *Eng Mee Yong* and that the respondent has succeeded in satisfying the Court that there is a serious question to be tried, it is my opinion that the caveator has not succeeded in satisfying the second requirement - that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action. I say so because in *Eng Mee Yong* the Judicial Committee of the Privy Council ruled that the proceeding for specific performance must be brought and prosecuted timeously by the caveator. At p. 215 of the judgment Lord Diplock said:

> In the case of a refusal by the vendor to complete a contract for the sale of land the normal remedy of the purchaser as plaintiff in an action is an order for specific performance of the contract; and in the absence of special circumstances, if it were shown that the vendor threatened to dispose of the land while the action was still pending, the balance of convenience would be in favour of granting an interlocutory injunction to prevent his doing so, provided that the plaintiff would be in a position to satisfy his undertaking as to damages if the action should fail at trial. So too in an application by the [caveatee][1] under s. 327 for the removal of a caveat, once the [caveator][2] has met the first requirement of satisfying the Court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence *until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale* which he alleges had been tried. [italics mine]
>
> [Note: 1. The word "caveator" in the MLJ is an error. 2. The word "caveatee" in the MLJ is an error.]

In other words, the caveator must show that, having entered the caveat, he had taken prompt action to commence proceeding for specific performance In the present case there is no evidence of prompt action for, until today, there is no evidence that the respondent has filed any writ claiming specific performance It is only at the commencement of the hearing today that learned Counsel for the respondent informed the Court from the bar that he has, today, filed the writ. The position therefore is that while the caveat was entered on 30 June 1992, the writ claiming specific performance is only filed today, 8 March 1993. In other words that there has been a delay of eight months. Having delayed for eight months the respondent cannot now be allowed to say to this Court that the balance of convenience should be in their favour. The presence of a caveat on the land register is a blot on the land affected and tends to hamper the registered proprietor in dealing with his land; therefore unless a caveator proceeds with reasonable diligence he ought not be allowed to continue to interfere with the rights of the registered proprietor.

I now come to the second applicant's (the purchaser's) application. In *Eng Mee Yong* it was ruled (at p. 215)

> It is otherwise when the applicant under s. 327 is someone other than the caveatee. He has no registered title to rely upon as *prima facie* evidence of his interest in the land. It is for him to begin by satisfying the Court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat.

The second applicant's statement in their affidavit ("Second Affidavit" in encl. 2) to the effect that they had entered into Sale and Purchase Agreements with the first applicant in respect of the lands is never disputed by the respondent. Learned Counsel for the respondent submits that there was a collusion between the first applicant and the second applicant; however, there is nothing in the affidavits to support such an allegation. Based on the reasons which I have given above in respect of the first applicant's application, it also follows that in the case of the second applicant, the caveator has also failed to discharge the onus that lies upon them.

MBf FINANCE BERHAD (FORMERLY KNOWN AS MALAYSIA BORNEO FINANCE CORPORATION (M) BHD.)

v.

TING KAH KUONG & ANOR.

HIGH COURT, KUCHING
DATO' HJ. ABDUL KADIR BIN SULAIMAN J.
[SUIT NO. KG. 218 OF 1990]
24 JUNE 1993

PRACTICE & PROCEDURE: Appeal - O. 56 r. 1 of the Rules of the High Court 1980 - Judgment entered for plaintiff under O. 14 - Counterclaim struck out under O. 18 r. 19 & O. 92 r. 4 of the Rules of the High Court - Hire purchase agreement between plaintiff & first defendant and guarantee agreement with second defendant - O. 14 application - Defence of both defendants - The agreements void and unenforceable - Section 1(2) Hire Purchase Act 1967, s. 4 Hire Purchase Registration Ordinance (Cap 71) of Sarawak, s. 35(5) Companies Act 1965, s. 3 Bill of Sale Ordinance (Cap 68) Sarawak - Loss not mitigated - Section 75 Contracts Act 1950, payment clauses not signed - Whether triable issues; alternative contentions of second defendant - Guarantee agreement void - In the nature of indemnity - Section 22 Hire Purchase Act 1967 - Material misrepresentation in the agreement - Whether triable issues; O. 18 r. 19 of the Rules of the High Court - Application to strike out counterclaim - Counterclaim for refund of payment made pursuant to s. 30(2) Hire Purchase Act - For order to compel plaintiff to repossess goods etc - For refund of payment made by another firm - Whether disclosed reasonable cause of action - Whether frivolous and vexatious.

This was an appeal by the first and second defendants under O. 56 r. 1 of the Rules of the High Court 1980 ('the RHC') in respect of the decision of the deputy registrar, entering judgment for the plaintiff against the defendants under O. 14 and striking out the counterclaim of the first defendant under O. 18 r. 19, and ordering costs against the defendants.

The plaintiff was a licenced finance company incorporated in Malaysia. Its business was run under the name of Malaysia Borneo Finance Corpn. (M) until 19 December 1985 when by virtue of a certificate of incorporation on the change of the name of company, the name of the plaintiff company was changed to MBf Finance